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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 498

THE STATE OF NORTH DAKOTA,
Petitioner,

vs.

RAPHAEL JEROME SZARKOWSKI,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The attorney general of the State of North Dakota, for and on behalf of the State of North Dakota, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Eighth Circuit, entered in the above case on September 11, 1945, affirming the order of the District Court for the District of North Dakota of February 2, 1945.

OPINIONS BELOW

The opinion of the District Court is reported in 60 Fed. Supp. 402. The opinion of the Circuit Court is as yet unreported.

JURISDICTIONAL STATEMENT

The judgment of the Circuit Court of Appeals, sought to be reviewed, was entered on September 11, 1945. The jurisdiction of this court is invoked upon two grounds:

1. Section 75 (s) of the Bankruptcy Act, as amended by the new Frazier-Lemke Act, August 28, 1935, Chap. 792, 49 Stat. at L. 943-945, 11 U. S. C. A., Sec. 203, is unconstitutional as interpreted by the Circuit Court, since that court eliminates and makes meaningless and ineffective the proviso incorporated in said act in subdivision (3) of Section 75 (s) of the Act, to-wit: "That upon request in writing by any secured creditor or creditors, the court shall order the property upon which such secured creditors have a lien to be sold at public auction."

2. The judgment of the Circuit Court of Appeals denies the petitioner the benefit of the Fifth Amendment to the Constitution of the United States by taking petitioner's property without due process of law.

QUESTIONS PRESENTED

Two questions are presented:

1. Is the proviso found in Section 75 (s) (3) of the Bankruptcy Act (Act of August 28, 1935, Chap. 792, 49 Stat. at L. 943-945, 11 U. S. C. A., Sec. 203), giving a secured creditor a right to a sale of the mortgaged property upon written request, when necessary to protect his security, an integral, effective part of the law, or may it be wholly nullified by interpretation by the court?

2. Is not the petitioner, a secured creditor, by the said judgment of the Circuit Court of Appeals deprived of its

property without due process of law in violation of the Fifth Amendment to the Constitution of the United States by the denial to it of the benefit of the proviso of said act, giving it a right to have the property mortgaged sold at public auction?

STATUTES INVOLVED

Section 75 (s) of the Bankruptcy Act, as amended by the new Frazier-Lemke Act, August 28, 1935, Chap. 792, 49 Stat. at L. 943-945, 11 U. S. C. A., Sec. 203.

STATEMENT

The petitioner, State of North Dakota, foreclosed a mortgage given to secure a loan of permanent school funds, and bid in the mortgaged land for the sum of $3,863.20, the amount then due on the loan, and received a sheriff's certificate entitling it to a deed, if no redemption be made within one year after sale or the sum of $3,863.20, with interest in case redemption be made. The order and judgment of the District Court, affirmed by the judgment of the Circuit Court of Appeals, which is now sought to be reviewed, gives the farm debtor the right to redeem for the sum of $1,300.00, the appraised value, or less than one-third the amount due on the sheriff's certificate.

Petitioner contends that the judgment of the Circuit Court is contrary to the plain provisions of the act involved, and deprives the petitioner of its property without due process of law in contravention of the Fifth Amendment to the Constitution of the United States.

REASON FOR GRANTING WRIT

The original Frazier-Lemke Act (Sec. 75 (s) of the Bankruptcy Act), Act of June 28, 1934, Chap. 869, 48 Stat. 1289, 11 U. S. C. A., Sec. 203 (s), gave the farm debtor an unqualified right to redeem his mortgaged land by payment into court of the appraised value thereof without any provision whatsoever for the protection of the secured creditor.

This act was held to be unconstitutional by the Supreme Court in the case of *Louisville Joint Stock Land Bank vs. Radford,* 295 U. S. 555, 55 S. Ct. 854, 79 L. ed. 1593, 97 A. L. R. 1106, upon the sole ground that it deprived the secured creditor of his property without due process. The amended act here involved was passed by Congress to remove this constitutional objection and the amended act was held by the Supreme Court to be constitutional solely because it gave the secured creditor a right to have the mortgaged premises sold at public sale at which the secured creditor could protect his interest in the property by bidding at such sale whenever held, in the case of *Wright vs. Vinton Branch of Mountain Trust Company,* 300 U. S. 444, 57 S. Ct. 556, 81 L. ed. 736, 112 A. L. R. 1455.

The decision of the Circuit Court in the case now sought to be reviewed in effect absolutely eliminates from the act the very provision which Congress put into it to make it valid. It in effect says that the farm debtor has an absolute right to redeem at the appraised value in every case, no matter how much such appraised value is less than the secured debt, and that the secured creditor's right to a public sale becomes operative if, and when, the farm debtor fails to redeem.

District Judge Paul, of Virginia, in a masterly opinion in the case of *In re Carter,* 56 Fed. Supp. 385, carefully analyzed

the authorities and fully supported our position. His opinion is a complete brief on the questions here involved. District Judge Wyman, of South Dakota, in the case of *In re Wolfheim* (not yet reported), held the same, following the Carter case. The Circuit Court reversed Judge Wyman in the case of *Wolfheim vs. State of South Dakota,* not yet reported, wholly, as we see it, on the strength of dicta in the case of *Wright vs. Union Central Life Insurance Co.,* 311 U. S. 273, 61 S. Ct. 196, 85 L. ed. 184.

Therefore, petitioner insists that the judgment here sought to be reviewed denies the secured creditor a right clearly given it by the plain provision of the act itself, and thereby deprives the petitioner of its property without due process of law.

Dated at Bismarck, North Dakota, this 15th day of September, 1945.

Respectfully submitted,

THE STATE OF NORTH DAKOTA,
Petitioner,

By NELS G. JOHNSON,
Attorney General,

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